Supreme Court, U.S.

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No. OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

JUDGE BRENDA J. HOLLAR

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS

and

KIM D. DAWSEY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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73 pp

QUESTIONS PRESENTED

1. Whether a Territorial Court trial judge is compelled, as a matter of law, to grant a prosecutor's Motion to Dismiss a criminal case despite the "leave of court" provision of Rule 48 (a) of the F.R.Cr.P. which is incorporated in the Territorial Court's Rules.

2. Whether the Revised Organic Act (Constitution) of the U.S. Virgin Islands (48 U.S.C. § 1541, et seq.) vests jurisdiction in the District Court of the Virgin Islands to issue writs of mandamus against judges of the Territorial Court of the Virgin Islands.

3. Whether the Presiding Judge of the Appellate Division of the District Court was required by 28 U.S.C. § 455 to recuse himself, *sua sponte*, from considering the Petition for Writ of Mandamus against Petitioner because of his actual bias.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

A. The Territorial Court of the Virgin Islands 4

B. Proceedings Below 6

REASONS FOR GRANTING THE WRIT 8

I. THE THIRD CIRCUIT'S INTERPRETATION OF RULE 48(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE DIRECTLY CONFLICTS WITH THE INTERPRETATION OF THIS COURT AND OTHER CIRCUITS 8

II. THE DECISION OF THE THIRD CIRCUIT IS OTHERWISE ERRONEOUS 11

a. The decision violates the Revised Organic Act (constitution) of the U.S. Virgin Islands

TABLE OF CONTENTS - Continued

Page(s)

(48 U.S.C. § 1541 et seq.) which does not vest in the District Court mandamus authority over Judges of the Territorial Court 11

b. The decision violates the Revised Organic Act (constitution) of the U.S. Virgin Islands (48 U.S.C. § 1541 et seq.) because it disregards Congress' intent to treat the Territorial Court as a State Court in its relations with the District Court 15

c. The decision violates 28 U.S.C. § 455 which compels a Federal Judge to recuse himself, *sua sponte*, because of bias against one party and in favor of another 17

III. THE QUESTIONS PRESENTED ARE IMPORTANT 19

CONCLUSION 21

APPENDICES

Appendix A:
"Judgment Order" of the Court of Appeals 1a

Appendix B:
"Memorandum Opinion and Order" of District Court's Appellate Division 3a

Appendix C:
"Order" Denying Petition for Rehearing 31a

TABLE OF CONTENTS - Continued

Page(s)

Appendix D:
Judge Hollar's "Order" of July 26, 1995 ..... 33a

Appendix E:
Government of the V.I.'s "Motion to Dismiss" 36a

Appendix F:
"Order" of the District Court's Appellate Division
Granting Stay of Judgment Pending Appeal 38a

Appendix G:
Pertinent Constitutional and Statutory Provisions 41a

TABLE OF AUTHORITIES

Cases: Page(s)

Brown v. Hansen, 973 F.2d 1118, 1120 (3d Cir. 1992) 11

Clark v. *State of Washington,* 366 F. 2d 678, 681 (9th Cir.1966) 16

Coniston Corp. v. *Village of Hoffman Estates,* 844 F. 2d 461, 469, (7th Cir. 1988) 16

Demos v. U.S. District Court for the Eastern District of Washington, 925 F.2d 1160, 1161 (9th Cir. 1991), *cert. denied,* 111 S. Ct. 1082, 498 U.S. 1123, 112 L. Ed. 2d 1186 16

Estate of Philomena Berry, Terr. Ct. Probate No. 113/1989 15

Estate Thomas Mall, Inc., v. *Territorial Court of the Virgin Islands,*923 F. 2d 258 (3d Cir. 1991), *cert. denied,* 502 U.S. 808, 112 S. Ct. 50, 116 L. Ed. 2d 28 11

Florida v. *Rodriguez,* 469 U.S. 1,7, 105 S. Ct. 308, 311, 83 L.Ed. 2d 165 (1984) 19

Four Winds Plaza Partnership v. *Deal Furniture,* Terr. Ct. Civil No. 103/1996 15

Gov't of the V.I. v. *Adallah Donastorg,* Terr. Ct. Crim. No. F101/1996 15

Gov't of the V.I. v. *Aubrey Hart, Jr.,* Terr. Ct. Crim. No. F45/1994 15

Griggs v. *Provident Consumer Discount Co.,* 459 U.S. 56, 58, 103 S. Ct. 400, 401, 74 L. Ed 2d 25 (1982) (per curiam) 14

Haggard v. *State of Tennessee,* 421 F. 2d 1384, 1386 (6th Cir. 1970) 16

In Re Joseph Marcel Bryan, Terr. Ct. Probate No. 54/1993.15

In Re School Asbestos Litigation, 977 F.2d 764 (3d Cir. 1992) 19

TABLE OF AUTHORITIES - Continued

Page(s)

Joseph, et al. v. *Henry,* Terr. Ct. Civil No. 104/1995 15
Lamar v. *118th Judicial District of Texas,* 440 F. 2d 383, 384 (5th Cir. 1971) 16
Mallard v. *U.S. District Court for the Southern District of Iowa,* 490 U.S. 296, 308, 109 S.Ct.1814, 1822, 104 L. Ed.2d 318 (1989) 13,14, 15
Moravian School Advisory Board of St. Thomas v. *Rawlins,* 70 F. 3d 270, 274 (3d Cir. 1995) 16
McNabb v. *United States,* 318 U.S. 332, 341, 63 S. Ct. 608, 613 (1943) 19
People of the Territory of Guam v. *Quezada,* 905 F. 2d 263 (9th Cir.1990) 14
Phillips v. *Joint Legislative Committee on Performance and Expenditure Review of Mississippi,* 637 F. 2d. 1014, 1019 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S. Ct. 2035, 72 L.Ed. 2d 483 19
Rinaldi v. *United States*, 434 U.S. 22, 98 S. Ct. 81 (1977) 8,15,19
Tonkin v. *Michael,* 349 F. Supp. 78 (D.V.I. 1972), 9 V.I. 172 6
United States v. *Ammidown,* 497 F. 2d 615 (D.C. Cir. 1973) 9,15
United States v. *Cowan,* 524 F. 2d 504, (5th Cir. 1975).8,9,15
United States v. *Distasio,* 820 F. 2d 20, 23 (1st Cir. 1987)..14
United States v. *Hayden,* 860 F. 2d 1483, 1487 (9th Cir. 1988) 9,15
United States v. *Queen*, 847 F. 2d 346, 350 (7th Cir. 1988) . 14
United States v. *Strayer,* 846 F.2d 1262 (10th Cir. 1988).9,15
Veneri v. Circuit Court of Gasconade County et al., 528 F. Supp. 496, 498 (1981) 16
Walcott et al. v. *Brady,* D.V.I. App. Div. No. 1994-0056 17

TABLE OF AUTHORITIES - Continued

Page(s)

Constitutional Provisions:
U.S. Const. Art. IV, Section 3, Clause 2 ..... 2, 4,20
Revised Organic Act of the Virgin Islands, as amended, §23 2,15,16
Revised Organic Act of the Virgin Islands, as amended §23A 2, 12,13

Statutes and Rules
United States Code:
Title 28 U.S.C §455 ..... 6, 17, 18
Title 28 U.S.C §460 18
Title 28 U.S.C. § 1254 (1) 2
Title 28 U.S.C. §1631 17
Title 28 U.S.C. §1651 ..... 13, 17
Title 42 U.S.C. §3796 hh 20
Title 48 U.S.C. §1541 ..... 4, 11, 15
Title 48 U.S.C. §1611(a) 4
Title 48 U.S.C. §1611(c) 5
Title 48 U.S.C. §1613 ..... 2, 5, 15
Title 48 U.S.C. §1613a 2, 3
Title 48 U.S.C. §1613a(a) 4
Title 48 U.S.C. §1613a(b) 3
Title 48 U.S.C. §1613a(c) 5, 7
Virgin Islands Code:
4 V.I.C. §33 ..... 2, 12
4 V.I.C. §34 ..... 2, 3, 6, 11, 12, 13
4 V.I.C. §72(b) 2, 5, 11, 15
5 V.I.C. § 1141 18
Legislative Material:
Pub. L. 98-454 11
Federal and Local Rules:
Federal Rules of Criminal Procedure-Rule 48 ..... 5, 6, 7, 8, 9, 10, 15, 19, 20
Third Circuit Court's Local Rule 4.1 18
Third Circuit Court's Internal Operating Procedure Rule 11 18
Rule 7 of the Rules of the Territorial Court 5, 8
Rule 14 of the Rules of the Territorial Court 5, 15

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PETITION FOR WRIT OF CERTIORARI

Petitioner, JUDGE BRENDA J. HOLLAR, Associate Judge of the Territorial Court of the Virgin Islands, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Judgment Order of the Court of Appeals summarily affirming, without opinion, the decision of the Appellate Division of the District Court of the Virgin Islands was not reported but is reprinted in the appendix hereto ("App") at 1a. The opinion of the Appellate Division of the District Court of the Virgin Islands is reported at 931 F. Supp. 397 (D. Virgin Islands 1996), 34 V.I. 174, and is reprinted in the appendix at 3a.

JURISDICTION

The Judgment of the Appellate Division of the District Court of the Virgin Islands was entered on June 13, 1996. App., infra 29a. The Judgment Order of the U.S. Court of Appeals for the Third Circuit affirming, without opinion, the Judgment of the Appellate Division was rendered on December 31, 1996. App., infra 1a. The Third Circuit's Order denying rehearing *en banc* by a 7-5 vote was entered on February 20, 1997. App.,infra 31a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions pertinent to this case include Article IV, Section 3, Clause 2 of the United States Constitution; Sections 23 and 23A of the Revised Organic Act of the Virgin Islands, as amended (48 U.S.C. §§ 1613 and 1613a); Sections 33, 34 and 72b of Title 4 of the Virgin Islands Code. These provisions are set forth in App., infra 41a, 42a and 43a.

STATEMENT OF THE CASE

On May 6, 1995, Respondent Dawsey, a Deputy U.S. Marshal assigned to the District Court of the Virgin Islands, was arrested and charged in the Territorial Court of the Virgin Islands with domestic violence assault against his minor son whom he threatened to kill, together with his wife, if they ever reported the matter to the police. Petitioner, the trial judge, conducted a pretrial conference on June 26, 1995 in preparation for a bench trial. On July 9, 1995, the prosecutor, Respondent Government of the Virgin Islands, whose "Domestic Violence and Policy Guidelines" included, *inter alia*, a "no-drop" policy with respect to such cases, moved to dismiss with prejudice, alleging that the victim "now states that the facts as first alleged are not true and nor [sic] longer wishes to pursue the matter". App., infra 36a. Because the motion was unaccompanied by a

memorandum of law or supporting affidavit from the victim, Petitioner orally ordered the prosecutor to supplement it. The supplement, an affidavit from the prosecutor, essentially stated that the victim had recanted his story.

In order to determine if the motion was being made in good faith and in the public interest, Judge Hollar entered a written Order on July 26, 1995, requiring, *inter alia,* that the victim and his mother submit affidavits regarding (1) the falsity of the original version of the facts and (2) whether they had been threatened or coerced in any manner regarding the prosecution of the case. App., infra 33a. That same day, Respondent Dawsey petitioned the Appellate Division of the District Court for a Writ of Mandamus alleging delay by Judge Hollar in ruling on the motion and seeking to compel her to dismiss the case with prejudice. While awaiting the Government's response to her Order, Judge Hollar was served with the Petition for the Writ of Mandamus, and proceeded to respond, while deferring further action on the Motion to Dismiss.

Judge Hollar moved to dismiss the Petition for Writ of Mandamus but the motion was denied. Thereafter, the three-judge Appellate Division, (Andrews, J. dissenting) relying on 4 V.I.C. § 34, an obsolete, local V.I. statute for its subject matter jurisdiction, issued the writ and ordered Petitioner to dismiss the case with prejudice. App., infra 29a. This decision was made without any briefing by the parties or courtesy of a hearing.

During the pendency of the Petition for Writ of Mandamus, Judge Hollar, who also serves as an appellate panel member of the Appellate Division pursuant to 48 U.S.C. § 1613a(b), was engaged in a bitter dispute with the Presiding Judge of the Appellate Division regarding her authorship of an opinion in an unrelated appellate case. Respondent Dawsey's duties include providing security for the Presiding Judge of the Appellate Division.

Judge Hollar appealed the Appellate Division's decision to the Third Circuit pursuant to 48 U.S.C. §1613a and moved for

a stay of the judgment pending appeal. The Presiding Judge of the Appellate Division granted the motion conditioned upon Judge Hollar posting a cost bond in the amount $500.00 and moving for an expedited appeal. Both conditions were illegal because they are contrary to local law and rules of the Appellate Division. The bond was posted under protest and the motion for expedited appeal was not granted. Subsequently, the Presiding Judge vacated the illegal bond requirement. Thereafter, the Third Circuit issued its Judgment Order summarily affirming the decision of the Appellate Division and denied rehearing and rehearing *en banc*.

A. The Territorial Court of the Virgin Islands

An understanding of the relationship between the Territorial Court and the District Court of the Virgin Islands and its Appellate Division is essential in addressing the issues presented.

Pursuant to Article IV, Section 3 of the United States Constitution, Congress enacted the Revised Organic Act of the U.S. Virgin Islands (48 U.S.C. §1541, et seq.) which is also known as the Constitution of the U.S. Virgin Islands. The Act, which was comprehensively amended by Congress in 1984 to grant greater judicial autonomy to the people of the Virgin Islands, vests the judicial power of the Territory in "the 'District Court of the Virgin Islands' established by Congress and in such appellate court and lower local courts as may have been or may hereafter be established by local law". 48 U.S.C. §1611(a). Congress also authorized the V.I. Legislature to create its own Appellate Court. Until then, Congress established a temporary Appellate Division in the District Court with very limited jurisdiction to hear and determine appeals from the local (Territorial) Court. 48 U.S.C. § 1613a(a). Congress limited the Appellate Division's jurisdiction to that prescribed by local law and set its membership at three (3) i.e. two (2) judges of the District Court, including the Chief Judge who serves as the Presiding Judge, and a judge of the Territorial Court. Appeals

from the Appellate Division are taken to the U.S. Court of Appeals for the Third Circuit, pursuant to 48 U.S.C. § 1613a(c), and thereafter to the U.S. Supreme Court.

In establishing the Territorial judiciary, Congress mandated that the relationship between the District Court and the Territorial Court shall be similar to that between Federal Courts, including the Supreme Court, and State Courts. 48 U.S.C. § 1613. In this regard, Congress vested the Territorial Court with the power to promulgate its own Rules of Practice and Procedure and regulate the admission of attorneys to the V.I. Bar, functions usually performed by State Appellate Courts. 48 U.S.C. §1611(c). Pursuant to this authority, the Territorial Court has promulgated its Rules of Practice and Procedure and incorporated therein the Federal Rules of Civil and Criminal Procedure to the extent they are not inconsistent with its rules. See, Rule 7 of the Rules of the Territorial Court. App., infra 43a.

In terms of the allocation of jurisdiction, the District Court generally has the jurisdiction of an Article III United States District Court while the Territorial Court has jurisdiction over all local civil and criminal actions. Administratively, the Presiding Judge of the Territorial Court is by law its chief administrative officer, responsible for, *inter alia*, (1) ensuring observance by the Court of its Rules of Practice and Procedure, (2) securing the prompt dispatch of the Court's business and (3) supervising the Judges and other employees of the Court. See, 4 V.I.C. § 72b, (App., infra 43a) and Rule 14 of the Rules of the Territorial Court (1997 Ed.).

In this case, since Judge Hollar was not even given the opportunity to complete her inquiry before ruling on the motion to dismiss, the questions presented here involve: (1) her obligation to exercise discretion, pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, in considering the Government's Motion to Dismiss the domestic violence assault case against Dawsey; (2) the Appellate Division's authority to

issue writs of mandamus against judges of the Territorial Court, and (3) the violation of the *sua sponte* recusal provision of 28 U.S.C. § 455.

B. Proceedings Below

The criminal case against Dawsey was progressing in a timely and routine manner in the Territorial Court when the Government unexpectedly moved to dismiss it with prejudice. Being fully aware that the victim had required emergency medical treatment, that the motion appeared to violate the Government's own policy regarding the prosecution of domestic violence cases, and that Respondent Dawsey, being armed, had the ability to carry out his threats to kill his wife and the victim, his minor son, Judge Hollar attempted to satisfy herself that the motion was being made in good faith and in the public's interest before ruling on it. Rather than await her ruling, Dawsey petitioned the Appellate Division of the District Court for a Writ of Mandamus to order Judge Hollar to dismiss the case, contending that she had no discretion in ruling on the motion and that he needed a speedy resolution because of fear of losing his job.

The three-judge Appellate Division, with one judge dissenting, granted the petition and issued the writ, holding that it had "unquestioned power and jurisdiction to issue writs of mandamus against judges of the Territorial Court" pursuant to 4 V.I.C. § 34 and that while "Rule 48(a) of the F.R.Cr.P. governs dismissal of cases in [the Territorial] Court," Judge Hollar had "no discretion to not grant the Motion to Dismiss." While acknowledging this Court's interpretation of the "leave of court" provision of Rule 48(a) as vesting some discretion in the trial judge, the Appellate Division made no secret of its reliance on *Tonkin v. Michael*, 349 F. Supp. 78 (D.V.I. 1972), 9 V.I. 172, which sanctioned the prosecutor's "broad mantle of discretion and exclusive control over the misdemeanor prosecutoral function" at common law. App., infra 9a. Both 4 V.I.C. § 34 and *Tonkin* are archaic and inapplicable.

Judge Hollar appealed the Appellate Division's decision to the Third Circuit pursuant to 48 U.S.C. § 1613a(c), contending that (1) the Appellate Division lacked the authority to issue writs of mandamus against judges of the Territorial Court, (2) assuming it had such authority, the Appellate Division abused its discretion in issuing the writ by holding that she had no discretion, pursuant to Rule 48(a), to consider the Motion to Dismiss and (3) the Presiding Judge of the Appellate Division should have recused himself, *sua sponte,* because of his bias against Judge Hollar and in favor of Dawsey.

After briefing and oral argument, the Third Circuit issued a Judgment Order summarily affirming, without opinion, the Appellate Division's decision despite the fact that construction of the "leave of court" provision of Rule 48(a) and the Appellate Division's authority to issue writs of mandamus against judges of the Territorial Court were issues of first impression in the Circuit. Also, the Court failed to rule on the issue of bias which only manifested itself after issuance of the writ and which was thus properly raised for the first time before the Third Circuit.

Judge Hollar thereafter petitioned for rehearing with suggestion for rehearing *en banc* which was denied, by a vote of 7-5.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S INTERPRETATION OF RULE 48(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE DIRECTLY CONFLICTS WITH THE INTERPRETATION OF THIS COURT AND OTHER CIRCUITS AND WOULD LEAD TO CHAOS WITHIN THE CIRCUIT.

The Appellate Division correctly held that Rule 48(a)[1] of the Federal Rules of Criminal Procedure governed dismissal of criminal actions in the Territorial Court. Despite the "leave of court" provision of the rule, however, the Appellate Division held that Petitioner "had no discretion not to grant the respondent's motion to dismiss"[2] and was thus obligated to dismiss the case with prejudice.

This ruling directly conflicts with this Court's interpretation of the "leave of court" provision. Specifically, in *Rinaldi* v. *United States,* 434 U.S. 22, 34, 98 S.Ct. 81, 87 (1977), this Court stated that the phrase "obviously vests some discretion in the Court" in ruling on motions to dismiss while noting that it had not delineated "the circumstances in which that discretion may properly be exercised". The dissent also concurred in the majority's interpretation, with then Justice Rehnquist, joined by Justice White, noting that "the provision was specifically added as an amendment to the original draft, which provided for automatic dismissal upon the motion of the United States, and would seem clearly directed toward an independent judicial assessment of the public interest in dismissing the indictment". Id.

Other Circuits which have interpreted the provision have reached a similar conclusion. Specifically, in *United States* v.

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[1] Rule 48(a) provides that "the Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint." This rule is a rule of practice in the Territorial Court pursuant to Rule 7 of the *Rules of the Territorial Court.*

[2] App., infra 18a. See also, App. infra 12a, 21a n. 21.

Cowan, 524 F.2d 504, (5th Cir. 1975), cert. denied 425 U.S. 971 (1976) which represented the first time a Federal Appellate Court came "face to face with the asserted power of a District Court under 48(a) to grant or withhold leave to dismiss a criminal prosecution once begun,"[3] the Court held that:

> We think it manifestly clear that the Supreme Court intended to clothe the Federal Courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice. [4]

The Court further held that the "leave of court" phrase "was intended to modify and condition the absolute power of the Executive, consistently with the framer's concept of Separation of Powers, by erecting a check on the abuse of executive prerogatives." [5] See also, *U.S.* v. *Hayden*, 860 F.2d 1483, 1487 (9th Cir. 1988)[Rule 48(a) empowers the District Court to exercise its discretion in denying the motion when it specifically determines that the Government is operating in bad faith]; *United States* v. *Strayer*, 846 F.2d 1262, 1265 (10th Cir. 1988)[Requiring the Government to obtain "leave of court" to dismiss an indictment...is intended to allow Courts to consider the public interest, fair administration of criminal justice and preservation of judicial integrity when evaluating Motions to Dismiss...the general rule under Rule 48(a) is that the District Court should grant a prosecutor's Motion to Dismiss unless dismissal is clearly contrary to manifest public interest] and *United States v. Ammidown*, 497, F.2d 615, 620 (D.C. Cir. 1973)[The Court will not be content with a mere conclusory statement by the prosecutor that dismissal is in the public interest

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[3] *Cowan, supra* at 509.

[4] Id. at 512.

[5] Id. at 513.

but will require a statement of the reasons and underlying factual basis... The rule contemplates exposure of the reasons for dismissal in order to prevent the abuse of the uncontrolled power of dismissal previously enjoyed by prosecutors...].

Although the case at bar represented the first time the Third Circuit came face to face with the asserted power of a trial court under Rule 48(a) to grant or withhold leave to dismiss a criminal prosecution after the case had been filed in Court, the Court failed to definitively rule on the matter. By affirming the decision of the Appellate Division, however, the Court adopted the Appellate Division's interpretation of the rule which thus binds the entire Circuit.

The resulting split with this Court and the Circuits which have interpreted the rule promises to cause further litigation and catastrophic disruption in the judiciary both locally and throughout the Circuit. Pending and future cases throughout the Circuit can be dismissed upon the mere whim and fancy and bad faith of prosecutors without judicial scrutiny, thereby ensuring the selective prosecution of criminals contrary to law and the public interest. Additionally, the decision effectively renders moot the discretionary provision of the rule, thereby causing irreparable injury to the administration of justice in the Circuit.

There is no realistic prospect for resolution of this far reaching conflict without a decision by this Court. Any appellate decision hereafter will simply side with this Court and the other Circuits or with the Third Circuit. The Court should grant certiorari to resolve this important conflict.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

a. The decision violates the Revised Organic Act (constitution) of the U.S. Virgin Islands (48 U.S.C. § 1541 et seq.) which does not vest in the District Court mandamus authority over Judges of the Territorial Court.

The Revised Organic Act of the Virgin Islands, as amended, is the constitution of the U.S. Virgin Islands. *Brown* v. *Hansen,* 973 F.2d 1118, 1120 (3d Cir. 1992). It is indisputable that Congress has established the Appellate Division of the District Court as a Court of very limited appellate jurisdiction.[6] Nevertheless, the Appellate Division ruled that it has "undoubted power and jurisdiction to hear and determine petitions... [for writs of mandamus against] Judges of the Territorial Court." App., infra 7a. As stated by the Appellate Division, the source of this undoubted power and jurisdiction is 4 V.I.C. § 34, a local statute which was rendered obsolete by Congress in 1984 when it comprehensively amended the Organic Act. See, Pub. L. 98-454, 98 Stat. 1737 (1984).

According to the Third Circuit's own rulings, no such local law is capable of vesting jurisdiction in the Appellate Division without Congressional authorization. Specifically, in *Estate*

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[6] The reason Congress chose not to vest mandamus jurisdiction in the Appellate division is obvious. Congress fully intended to grant greater judicial autonomy to the Courts established by local law when it comprehensively amended the Revised Organic Act in 1984, and it was well aware that local law, i.e. 4 V.I.C. Section 72b, had vested in the Presiding Judge of the Territorial Court full supervisory authority over the judges and personnel of that Court. In light of this local law, which was consistent with its intent, Congress saw no need to vest in the Appellate Division supervisory authority and, *ergo,* mandamus authority over Judges of the Territorial Court.

Thomas Mall Inc. v. *Territorial Court of the Virgin Islands,* 923 F.2d 258, 261 (3d Cir. 1991), cert. denied 502 U.S. 808, 112 S. Ct. 50, 116 L. Ed. 2d 28, the Court held that "only Congress has the power to determine the jurisdiction of the District Court of the Virgin Islands under Article IV of the United States Constitution." Thus, according to the Court, "we must look only to the language of the Revised Organic Act to determine the scope of the District Court's jurisdiction". Id. Concomitantly, it is clear that only where Congress authorizes the V.I. Legislature to vest certain jurisdiction in the District Court, can the V.I. Legislature act to vest such jurisdiction. Such vesting must be restricted to what was authorized by Congress, and only then can the District Court validly exercise jurisdiction vested in it by local law. Any other purported vesting of jurisdiction in the District Court or its Appellate Division by local law is null and void. Since Congress has vested no such authority in the V.I. Legislature, the purported vesting of such "undoubted power and jurisdiction" in the Appellate Division by the V.I. Legislature via 4 V.I.C. §34 is null and void.

Furthermore, nothing in the Revised Organic Act of the Virgin Islands, as amended, vests in the Appellate Division "jurisdiction to hear and determine Petitions for Writs of Mandamus against Judges of the Territorial Court" as stated by the Appellate Division. In Section 23A of the Act, Congress specifically limits the Appellate Division's jurisdiction to that appellate jurisdiction now or hereafter prescribed by the V.I. Legislature. This appellate jurisdiction is contained in 4 V.I.C. §33 and nowhere else. Moreover, Congress did not authorize the V.I. Legislature to vest mandamus authority in the Appellate Division in aid of its appellate jurisdiction. Clearly, in the absence of such authority, 4 V.I.C. §34, which was enacted by the local legislature via the 1921 codes is repealed by implication by the 1984 amendment to the Revised Organic Act of the Virgin Islands. Accordingly, the Appellate Division's statement during

the proceedings that "Section 23A is the basis for the Legislature's enactment of 4 V.I.C. §34" is false, especially since Section 23A was enacted in 1984 and 4 V.I.C. §34 was enacted approximately 63 years prior to the enactment of Section 23A. Moreover, the "All Writs Act", 28 U.S.C. §1651, does not vest mandamus authority in the Appellate Division, even though it vests such authority in the District Court as a trial court. Indeed, the Appellate Division does not even claim that the "All Writs Act" is a basis for its action, since it prohibits Federal Courts from issuing Writs of Mandamus to State Courts.

Thus, in the absence of any authority in the Revised Organic Act of the Virgin Islands, as amended, vesting jurisdiction in the Appellate Division to issue Writs of Mandamus against Judges of the Territorial Court and in the absence of any congressional authority in the local Legislature to vest such mandamus jurisdiction in the Appellate Division, it has no jurisdiction to issue Writs of Mandamus against Territorial Court Judges.

Even if mandamus authority exists, the decision violates this Court's decisions regarding the requirements for obtaining Writs of Mandamus.

In *Mallard* v. *U.S. District Court for the Southern District of Iowa,* 490 U.S. 296, 308, 109 S.Ct. 1814, 1822, 104 L.Ed. 2d 318 (1989), this Court held that a litigant seeking a Writ of Mandamus must prove that the trial Court committed a "clear abuse of discretion" and that the litigant lacks adequate, alternative means to obtain relief other than mandamus.

With respect to the first requirement, it is clear that by any objective review of the record, Judge Hollar never abused her discretion as stated by the Appellate Division. App., infra 12a. In the first place, she never exercised any discretion because she never ruled on the motion. Nor did she have any reasonable

opportunity to do so because of the Appellate Division's precipitous intervention in the case.

The Appellate Division's ruling that she refused to rule on the motion is simply false. In the brief period of time, i.e. 20 days, between the filing of the Motion to Dismiss and the filing of the Petition for Writ of Mandamus, Judge Hollar issued two (2) Orders, one oral and one written, which were designed to satisfy herself that the motion was being made in good faith and was not contrary to the public interest as required by Rule 48(a). On the same day the written Order was entered, i.e. July 26, 1995, the Petition for Writ of Mandamus was filed.

The Government never refused to comply with the Order. Indeed, the Court could have compelled compliance if there was a refusal. Thus, there was no "impasse" as stated by the Appellate Division. Moreover, the petition was, in effect, an improper interlocutory appeal which, nonetheless, stayed further consideration of the motion by Judge Hollar as a matter of law. *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400 (1982) (Per curiam); *United States* v. *Queen*, 847 F.2d 346, 350 (7th cir. 1988); *United States* v. *Distasio*. 820 F.2d 20, 23 (1st Cir. 1987).

In the absence of any exercise of discretion by Judge Hollar, the "abuse of discretion" requirement enunciated in *Mallard*, *supra*, was not met, hence issuance of the writ was clearly erroneous.

Similarly, Dawsey was not entitled to extraordinary relief in the nature of mandamus because he had other available legal remedies. Specifically, while the Government and Dawsey could not have appealed a denial of the Motion to Dismiss at the interlocutory stage[7], had the case proceeded to trial and

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[7] *People of the Territory of Guam* v. *Quezada*, 905 F.2d 263 (9th Cir. 1990).

Dawsey been convicted, he then could have appealed the denial of the motion. This was precisely the remedy relied upon in *Rinaldi, Cowan, Ammidown, Hayden and Strayer, supra,* where the Courts denied the prosecutors' motions to dismiss criminal cases and appeals of the denials were taken after conviction.

Additionally, the Government and Dawsey's contention about the inapplicability of Rule 48(a) and the alleged delay of Judge Hollar in disposing of the motion could have been addressed to the Presiding Judge of the Territorial court who, pursuant to 4 V.I.C. §72b, is responsible for ensuring observance of the Court's Rules of Practice and Procedure, including Rule 48(a), by Judges of the Territorial Court and securing the prompt dispatch of the Court's business. See Terr. Ct. R. 14 (1997 Ed.). This is precisely the remedy that has been utilized by other litigants in civil, criminal and other cases in the Territorial Court. See for example, *Four Winds Plaza Partnership v. Deal Furniture,* Terr. Ct. Civil No. 103/1996; *Joseph, et.al.* v. *Henry,* Terr. Ct. Civil No. 104/1995; *In Re Joseph Marcel Bryan*, Terr. Ct. Probate No. 54/1993; *Estate of Philomena Berry,* Terr. Ct. Probate No. 113/1989; *Gov't of the V.I.* v. *Adallah Donastorg,* Terr. Ct. Crim. No. F101/1996; *Gov't of the V.I.* v. *Aubrey Hart, Jr.* Terr. Ct. Crim. No. F45/1994.

In light of the foregoing, Dawsey was not entitled to mandamus relief pursuant to *Mallard, supra.*

b. The decision violates the Revised Organic Act (constitution) of the U.S. Virgin Islands (48 U.S.C. § 1541 et seq.) because it disregards Congress' intent to treat the Territorial Court as a State Court in its relations with the District Court.

In 1984, Congress substantially amended the constitution to provide for greater judicial autonomy to the people of the Virgin Islands. Among those amendments was a new Section 23 (48

U.S.C. §1613) which provides that the relationship between the District Court and the Territorial Court shall be similar to the relationship between Federal Courts and State Courts with respect to certain matters or proceedings. It is clear that a Petition for Writ of Mandamus is a "matter or proceeding" within the meaning of Section 23 and that in considering such petitions, the Appellate Division is required to treat the Judges of the Territorial Court as State Court Judges. The Third Circuit has never ruled on the applicability of Section 23 to the Appellate Division with respect to its issuance of Writs of Mandamus against Judges of the Territorial Court.

However, pursuant to the "All Writs Act", Federal Courts are prohibited from issuing Writs of Mandamus to State Courts Judges and such petitions are deemed frivolous as a matter of law. *Demos* v. *U.S. District Court for the Eastern District of Washington*, 925 F. 2d 1160, 1161 (9th Cir. 1991), cert. denied 111 S. Ct. 1082, 498 U.S. 1123, 112 L.Ed. 2d 1186. See also, *Coniston Corp.* v. *Village of Hoffman Estates,* 844 F. 2d 461, 469, (7th Cir. 1988); *Veneri* v. *Circuit Court of Gasconade County et al.*, 528 F. Supp. 496, 498 (1981); *Clark* v. *State of Washington,* 366 F. 2d 678, 681 (9th Cir. 1966); *Haggard* v. *State of Tennessee,* 421 F.2d 1384, 1386 (6th Cir. 1970); *Lamar* v. *118th Judicial District Court of Texas*, 440 F. 2d 383, 384 (5th Cir. 1971).

Despite this prohibition and the clear intent of Section 23, the Third Circuit has, in effect, violated Section 23 by vesting in the Appellate Division jurisdiction to issue Writs of Mandamus to Judges of the Territorial Court.

This ruling is inconsistent with the Third Circuit's own ruling in *Moravian School Advisory Board of St. Thomas* v. *Rawlins,* 70 F.3d 270, 274 (3d Cir. 1995) which acknowledged Congress' intent to treat the Territorial Court as a State Court in its relations with the District Court. Based upon this intent, *Moravian*

concluded that the District Court could not, pursuant to 28 U.S.C. §1631, transfer cases over which it had no jurisdiction to the Territorial Court just as Federal Courts could not similarly transfer such cases to State Courts. By analogy, the Appellate Division, a Court of very limited jurisdiction, is similarly prohibited by 28 U.S.C. §1651 from issuing Writs of Mandamus to Judges of the Territorial Court, especially since the presiding Judge of the Territorial Court is vested with supervisory authority over judges of that Court.

The Third Circuit's decision is thus erroneous because it violates the V.I. Constitution.

c. The decision violates 28 U.S.C. § 455 which compels a Federal Judge to recuse himself, *sua sponte*, because of bias against one party and in favor of another.

The Presiding Judge of the Appellate Division was required to recuse himself, *sua sponte,* because of his actual bias against Judge Hollar and in favor of Dawsey. The bias against Judge Hollar first surfaced during the pendency of the Petition for Writ of Mandamus and resulted from a bitter exchange of correspondence between herself and Presiding Judge Thomas K. Moore regarding her authorship of the Appellate Division's opinion in the case of *Walcott et al.* v. *Brady* et al., D.C. App. Div. No. 1994-0056.

Although Judge Hollar reasonably believed that her dispute with Judge Moore had been amicably resolved because of the intervention of the Presiding Judge of the Territorial Court and the Chief Judge of the Third Circuit, such was not the case. Judge Moore's bias against Judge Hollar became manifest when in granting her motion for stay pending appeal of its decision, he conditioned it upon her posting a cost bond of $500.00 and ordered her to request an expedited appeal. App., infra 39a. Judge Moore knew or should have known that both conditions

were illegal and in violation of law and the rules of the Third Circuit.[8] Additionally, Judge Moore cancelled the next two (2) Appellate Panels on which Judge Hollar was scheduled to sit. Judge Hollar posted the cost bond under protest but it was only when the matter was brought to the Third Circuit's attention during the appeal that Judge Moore vacated the order that the bond be posted. The request for expedited appeal was denied since it could not be justified and the Third Circuit had in any event mooted the matter by issuing a regular briefing schedule.

With respect to Appellee Dawsey, as a Deputy U.S. Marshal assigned to the District Court, he was, among other things, responsible for securing Judge Moore's personal safety and the safety of his courtroom. This, coupled with the fact that the Appellate division's decision relied on facts which were not in the record before Judge Hollar but which could only have been known through direct communication with Appellee Dawsey or his agents, suggests that Judge Moore was either actually or apparently biased in favor of Appellee Dawsey.

28 U.S.C. §455 which is made applicable to the District Court by 28 U.S.C. §460 requires a judge to recuse himself, *sua sponte,* where his impartiality could reasonably be questioned. Chapter 11 of the Third Circuit's "Internal Operating Procedures" provides for "Recusal or Disqualification of Judges" and has been adopted by the District Court's "Local Rules of Civil Procedure."

The Internal Operating Procedures of the Third Circuit incorporate the provisions of 28 U.S.C. §455 (I.O.P. 11.2.1.) and require a judge to "promptly inform[ing] the clerk of those cases in which the judge is recused" "before cases are sent to a panel." I.O.P. 11.1.1.

The above-described conduct of Judge Moore at best establishes an appearance of bias against Judge Hollar and in

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[8] See 5 V.I.C. §1141, 3rd Cir. Local Appellate Rule 4.1.

favor of Dawsey. Because his impartiality toward Judge Hollar could reasonably be questioned, he was required by 28 U.S.C. §455 and the rules of the Third Circuit and the District Court to recuse himself, *sua sponte. In Re School Asbestos Litigation,* 977 F.2d 764, 782 (3d Cir. 1992); *Phillips* v. *Joint Legislative Committee on Performance and Expenditure Review of Mississippi,* 637 F.2d 1014, 1019 (5th Cir. 1981) *cert. denied,* 102 S. Ct. 2035, 456 U.S. 960, 72 L.Ed. 2d 483. His failure to do so constituted reversible error.

III. THE QUESTIONS PRESENTED ARE IMPORTANT

By affirming without opinion, the Third Circuit has erroneously adopted the Appellate Division's split decision which improperly interprets Rule 48(a). That interpretation has so far departed from the accepted and usual construction by this Court and other Circuits as to call for an exercise of this Court's supervisory power to vindicate its primary responsibility for the proper and consistent functioning of the federal judiciary. *McNabb* v. *United States,* 318 U.S. 332, 341, 63 S.Ct. 608, 613 (1943); *Florida* v. *Rodriguez,* 469 U.S. 1,7,105 S.Ct. 308, 311, 83 L.Ed. 2d 165 (1984) (Stevens, J., dissenting). By effectively nullifying Rule 48(a), the Third Circuit has eliminated the power of judges within the Circuit to act as a check on prosecutorial abuse as intended by Congress.

Additionally, in *Rinaldi,* this Court noted that "the circumstances in which the discretion [contained in the 'leave of court' provision of Rule 48(a)] may properly be exercised have not been delineated by this Court." This case presents the Court with a unique opportunity to "kill two birds with one stone" by delineating those circumstances while at the same time ensuring consistency and uniformity by the federal judiciary in the interpretation of Rule 48(a). Review of the decision below is therefore necessary to accomplish these two (2) important objectives.

Review is also necessary to ensure and maintain the proper functioning of the Federal/Territorial Court relationship in the Territories as mandated by Congress pursuant to Article IV of the U.S. Constitution. If Congress intended this relationship to exist, this intent must be enforced.

The questions presented are also important because they go to the heart of our national policy requiring the treatment of domestic violence assaults as serious violations of criminal law warranting vigorous and equal enforcement. 42 U.S.C. Ch. 46, Sub. Ch. X11-1 § 3796hh. The non-prosecution of Dawsey sends a strong signal throughout the Territories, the Circuit and the nation that the policy could be violated for reasons wholly unrelated to the fair administration of justice.

Moreover, the decision below undermines public confidence in the integrity of the Territorial judiciary in particular and the judiciary within the Circuit in general by appearing to sanction judicial misconduct. Specifically, it permits judges with actual or apparent biases against litigants to sit in judgment of those litigants contrary to law, the Code of Judicial Conduct and the Rules of the Third Circuit.

In sum, the conflict presented by the Third Circuit's erroneous interpretation of Rule 48(a), together with its otherwise erroneous disposition of the case, are clearly important issues warranting review by this Court.

CONCLUSION

For all the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted

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Date: May 12, 1997

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96 -7434

KIM D. DAWSEY,
Appellee

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellee

HONORABLE JUDGE BRENDA J. HOLLAR,
Appellant

Appeal from the Appellate Division of
the United States District Court for the
District of the Virgin Islands
Division of St. Thomas
and St. John

(D.C. Civil No. 95-cv-00129)

Argued: December 12, 1996
Before: SCIRICA, NYGAARD, and MCKEE, Circuit Judges

JUDGMENT ORDER

Judge Brenda J. Hollar appeals from the writ of mandamus

issued by the Appellate Division of the United States District Court for the District of the Virgin Islands on June 13, 1996 directing her to dismiss with prejudice the criminal prosecution of Kim D. Dawsey for misdemeanor aggravated assault and battery. Judge Hollar contends that the district court did not have jurisdiction to enter that order, but that, if it did, the court abused its discretion in doing so. She also contends that the appellate division's presiding judge should have recused himself *sua sponte* from the panel hearing Mr. Dawsey's petition for a writ of mandamus.

After careful review of the record, oral argument, and consideration of all the contentions raised by Judge Hollar, it is

ADJUDGED AND ORDERED that the writ of mandamus issued on June 13, 1996 by the Appellate Division of the United States District Court for the District of the Virgin Islands be and is hereby affirmed.

BY THE COURT,
/s/ Hon. Theodore A. McKee
Circuit Judge

Attest:
/s/ P. Douglas Sisk, Clerk
December 31, 1996

APPENDIX B

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

D. Ct. Civ. No. 129-95
Re: Terr. Ct. Crim. No. 232-1995

KIM D. DAWSEY,
Petitioner,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS,
Respondent,

HONORABLE TERRITORIAL COURT JUDGE
BRENDA J. HOLLAR,
Nominal Respondent.

On Petition from the Territorial Court of the Virgin Islands

Considered: September 22, 1995
Filed: June 13, 1996

BEFORE: **THOMAS K. MOORE,** Chief Judge, District Court of the Virgin Islands; **RAYMOND L. FINCH**, District Court Judge for the District of the Virgin Islands; and **ALPHONSO G. ANDREWS,** Judge of the Territorial Court of the Virgin Islands, Division of St. Croix, Sitting by Designation.

APPEARANCES :
Charles Herndon, Esq.
St. Thomas, U.S.V.I.
Attorney for Petitioner

Richard Davis, Esq., Assistant Attorney General
V.I. Department of Justice St. Thomas, U.S.V.I.
Attorney for Respondent

Leon Kendall, Esq., General Counsel
Territorial Court of the Virgin Islands
St. Thomas, U.S.V.I.
Attorney for Nominal Respondent

MEMORANDUM OPINION

This matter is before the Court on petition by Kim D. Dawsey for writ of mandamus on the ground that the nominal respondent, Territorial Court Judge Brenda J. Hollar, has erroneously failed to grant the motion of the respondent, the Government of the Virgin Islands, for dismissal of the criminal charges filed against him. The Court having given all the parties an opportunity to brief this matter, and having reviewed the record, and for the reasons set forth below, the petition will be granted.[1]

FACTS

The undisputed facts from the record are that petitioner participated in a family dispute involving domestic violence, was arrested on May 6, 1995, and was charged with the misdemeanor of aggravated assault and battery in violation of V.I. CODE ANN. tit. 14, § 298. On July 6, 1995, after further investigation, the Government filed a motion to dismiss the criminal matter, with prejudice, reciting that

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[1] Nominal respondent was ordered to submit a brief on the merits of this matter, and instead has moved this Court first to clarify and then to reconsider its denial of nominal respondent's motion to dismiss the petition. We denied that motion because this Court clearly has mandamus jurisdiction over the Territorial Court and because we would have to address the merits to decide whether the petition states a claim upon which relief can be granted or is somehow inappropriate. No further clarification is warranted. This matter has been pending in this Court altogether too long, and, nominal respondent having elected not to submit a brief, we now proceed to decide its merits.

> [t]he victim in this matter now states that the facts as first alleged are not true and no longer wishes to pursue this matter. Without the testimony of the victim as originally reported, the government would not be able to meet its burden of proof beyond a reasonable doubt.

Government of the Virgin Islands v. Dawsey, Terr. Ct. Crim. No- 232/1995 [*"Dawsey"*] , Motion To Dismiss dated July 6, 1995 [*"Dawsey* Motion"]. In response to a request from Judge Hollar,[2] the Government supplemented the *Dawsey* Motion on July 11, 1995 with an affidavit from the Assistant Attorney General ["AAG"] handling the case, which recited the factual basis for the *Dawsey* Motion uncovered during her preparation of the prosecution:

> 3. That affiant interviewed the complaining witness, a minor and determined that the original facts, as alleged,were not true. The minor had recanted his story. The affiant further determined that the minor was not being influenced by his father, the defendant.
>
> 4. The defendant provided a statement by an witness to the event that verifying [sic] the new version of the incident.
>
> 5. The new version of the incident was also substantiated by Dr. Tom Tyne, who would testify as why the complaining witness filed the original complaint.
>
> 6. In light of the issues raised with the minor and his parents, the Government has filed actions in Family Court and feel [sic] that the issues within this family can best be addressed in that court.
>
> 7. In light of the victim's recantation of the

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[2] See *Amicus Curie* Brief filed October 10, 1995.

> facts, the witness provided by the defendant, the counselor's version of the facts and the remedies available in family [court], this affiant believes that the Government will be unable to prove the charges as filed. Furthermore, the action in Family Court can best address the situation.

Dawsey, Affidavit of Deborah Kleinman Robinson dated July 11, 1995 ["*Dawsey* Affidavit "].

On July 26th, the nominal respondent declined to grant the *Dawsey* Motion, even as justified by the supporting affidavit. Apparently believing that the motion to dismiss was not made in good faith, the judge noted that, "[b] efore ruling on the matter, the Court must be assured that the dismissal is not 'contrary to the public interest' and that the motion is made in 'good faith'." *Dawsey*, Order dated July 26, 1995 ["*Dawsey* Order of July 26] (quoting *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). Judge Hollar then required the prosecutor to submit yet more justification, ordering:

> that the Government have the victim and his mother submit separate affidavits, setting forth what portion of the original version of the facts is false; the reason they wish to discontinue the present action; whether they have been threatened or coerced in any manner regarding the prosecution of this matter; and whether their present position, not to pursue this matter, has been influenced in any way by the defendant; and it is further
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> **ORDERED,** that the Government submit the statement by the "witness" to the event, as referred in the supplemented motion, verifying the true version of the incident, and to provide Dr. Tom Tyne's substantiation of the new version and why he believes the complaining witnesses concocted the original version; and it is further

> **ORDERED** that Government disclose the action filed in Family Court which addressed the issues involved...

Dawsey Order of July 26. Dawsey then filed this petition for a writ of mandamus, and the respondent has filed an *amicus curiae* brief in support of the petition. As we noted, Judge Hollar has declined to submit a brief on the merits.[3]

DISCUSSION

We first discuss the strict requirements for mandamusing a lower court judge where judicial discretion is involved. We then consider whether the nominal respondent erred in not granting the respondent's motion to dismiss. Finally, if there is error, we then determine if the likely consequences of that error warrant granting the writ.

The Writ of Mandamus - Requirements

We have earlier ruled in this case that the Appellate Division has undoubted power and jurisdiction to hear and determine petitions, "issue writs... and make mandatory orders and all other orders necessary or appropriate in aid of its...appellate jurisdiction" over the judges of the Territorial Court. 4 V.I.C. §34.[4] The Supreme Court has summarized the remedy of the writ:

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[3] See supra, n.1.

[4] We therefore do not reach whether mandamus authority under V.I. CODE ANN. 5, §1361 still has any applicability to the Appellate Division now that initial and original jurisdiction over local matters has been transferred to the Territorial Court. Even assuming section 1361 applies to this Court, its language specifically limits that applicability to controlling ministerial acts. 5 V.I.C. §1361 (a) ("[T]he district court may issue a mandatory order to any inferior court, corporation, board, officer, or person, to compel performance of an act which the law specially enjoins as a duty resulting from an office...[a]lthough the order shall not control judicial discretion "); see, e.g., *Virgin Islands Hous. Auth. v. Smith,* 26 V.I. 248, 762 F. Supp. 661 (D.V.I. App. 1991), vacated as moot, 953 F.2d 1382 (3d Cir. 1992).

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."
>
> . . .
>
> As a means of implementing the rule that the writ will issue only in extraordinary circumstances, we have set forth various conditions for its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires, and that he satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.

Kerr v. United States, 426 U.S. 394, 402-03 (1976) (citations omitted). While grant of the writ is discretionary, it is called for when the petitioner shows that the lower court committed a "clear abuse of discretion," *Mallard v. United States* District Court, 490 U.S. 296, 309 (1989), and that the error will cause irreparable injury if it goes uncorrected, *United States v. Wexler*, 31 F.3d 117, 128 (3d Cir. 1994) (citations omitted), *cert. denied*,

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[5] Thus disposed of is the nominal respondent's argument that the petition must be dismissed because mandamus cannot control judicial discretion.

115 S. Ct. 1251 (1995).[5] The factors here pertinent to establish the extraordinary circumstances justifying mandamus are: (1) clear abuse of discretion amounting to a usurpation of power; (2) clear and indisputable right to relief; (3) absence of any other adequate means to receive that relief; and (4) irreparable injury if the error goes unremedied.

The Motion To Dismiss and Rule 48(a)

In considering whether the nominal respondent erred in not granting the respondent's motion to dismiss, we are required to limn the interface of the respective spheres of discretion assigned to the executive and the judiciary by constitutional separation of powers. The prosecutorial function is vested in the executive department of the Government of the Virgin Islands known as the Department of Justice, headed by the Attorney General of the Virgin Islands. 3 V.I.C. §§111,112(A). The Attorney General has the power and the duty "to prosecute in the inferior courts all offenses against the laws of the Virgin Islands."3 V.I.C. §114 (a) (2). Courts in this jurisdiction have long recognized that, based on the constitutional doctrine of separation of powers, "the Attorney General has been given the mantle of broad discretion and **exclusive** control over the misdemeanor prosecutorial function." *Tonkin* v. *Michael,* 9 V.I. 172, 179, 349 F. Supp. 78 (D.V.I. 1972) (emphasis added). As there pointed out,

> [i]t is the Attorney General who must determine whether, where and how to prosecute. For good or for ill, certain wide areas of our criminal justice system must be committed to the discretion of public officials. That public prosecutors do exercise enormous discretionary

authority is widely recognized.

Id.[6]

The prosecutor at common law, and in federal courts, had unbridled discretion simply by entry of a *nolle prosequi* to dismiss a criminal prosecution without any action of court. *In re Confiscation Cases*, 74 U.S. 454, 457 (1873). We therefore consider whether any constraints have been placed on this absolute prosecutorial discretion in criminal proceedings brought in the Territorial Court. Although there is no specific provision in the Virgin Islands Code or Rules of the Territorial Court, we find that Rule 48 of the Federal Rules of Criminal Procedure governs dismissal of a criminal case in that court.[7] Specifically, Rule 48(a), allowing dismissal on motion by the

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[6] The dissent chooses to ignore this case, which is the equivalent of a decision of this Appellate Division and the closest thing we have to controlling authority in this jurisdiction. *Tonkin v. Michael*, 9 V.I. 172 (D.V.I. 1972), was an appeal from the predecessor of the Territorial Court to the District Court decided under the appellate procedures established by the Revised Organic Act before the 1984 amendments which set up the Appellate Division. See Section 23A(b) of the Revised Organic Act of 1954, 48 U.S.C. § 1613a(b). The Revised Organic Act of 1954 may be found at 48 U.S.C §§ 1541-1645 (1995), reprinted in V.I. CODE ANN., Historical Documents, 73-177 (codified as amended) (1995) [Revised Organic Act].

[7] The Federal Rules of Criminal Procedure apply to criminal proceedings in the Territorial Court, absent an express rule or provision in the law or the rules to the contrary. "The practice and procedure of the Territorial Court shall be governed by the Rules of the Territorial Court and, to the extent not inconsistent therewith, by the . . . Federal Rules of Criminal Procedure." TERR. CT. R. 7. We are thus bound by the interpretation of these federal rules by the United States Supreme Court and the United States Court of Appeals for the Third Circuit, and should find persuasive procedural decisions of other United States Courts of Appeals, even though these rules are being applied in a context of purely local proceeding in the Territorial Court, a court created by local, Virgin Islands law. See *In re M.B.*, 909 F. Supp. 298, 302 n.17 (D.V.I. App. 1995), as amended by V.I. BBS 94CRIIIA.DT3 (D.V.I. APP. Jan. 23, 1996).

prosecutor, provides that the prosecutor "may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate." FED. R. CRIM. P. 48(a). While the Supreme Court has observed that Rule 48(a) "obviously vest[s] some discretion in the court, the circumstances in which that discretion may properly be exercised have not been delineated by this Court," noting that the "principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection." *Rinaldi v. United States,* 434 U.S. 22, 29 n.15 (1977) (citations omitted), *rev'g sub nom. In re Washington,* 544 F.2d 203 (5th Cir. 1976) (*en banc*).

Under this interpretation that the words 'by leave of court' in Rule 48(a) limit the trial judge's discretion to protecting the defendant from prosecutorial harassment, the nominal respondent clearly has exceeded her authority to interfere with the prosecutor's discretion to dismiss a case and has usurped the executive's power. The prosecutor moved for dismissal with prejudice, which would forever preclude the Government from reprosecuting this case. If the judge's only role in ruling on a motion to dismiss is to protect a defendant from future prosecutorial harassment, a dismissal with prejudice would allow no discretion for the nominal respondent to question the AAG's motivation under this view of Rule 48(a)

We reach the same result under the interpretation espoused in the 1975 opinion of the Court of Appeals for the Fifth Circuit relied on by the nominal respondent, namely, that the exercise of the executive's discretion to dismiss a criminal prosecution "should not be judicially disturbed unless clearly contrary to

manifest public interest." *Cowan*, 524 F.2d at 513.[8] We emphasize that even the *Cowan* court found that the judge had abused his limited discretion in refusing to grant the government's motion to dismiss. While the Supreme Court had the benefit of the *Cowan* panel's reasoning when it decided *Rinaldi* in 1977, the Court did not expressly approve the *Cowan* reading of Rule 48(a). See *Rinaldi*, 434 U.S. at 29-30 n.15. Just as the Supreme Court did in *Rinaldi* and the court of appeals did in *Cowan*, we find on the facts of this case that the trial court abused its discretion in failing to grant the motion to dismiss, even assuming the nominal respondent had the discretion to assure that the dismissal was not contrary to the public interest and that the motion is made in good faith.

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[8] A more complete quotation gives the court's reasoning.

> [I] t seems altogether proper to say that the phrase "by leave of court" in Rule 48(a) was intended to modify and condition the absolute power of the Executive, consistently with the Framer's concept of Separation of Powers, by erecting a check on the abuse of Executive prerogatives. But this is not to say that the Rule was intended to confer on the Judiciary the power and authority to usurp or interfere with the good faith exercise of the Executive power to take care that the laws are faithfully executed...The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated. The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest...

United States v. *Cowan*, 524 F.2d 504, 513 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976) (citation omitted). We emphasize after concluding that Rule 48(a) gives the district judge this authority, the *Cowan* court nevertheless found that the judge had abused this limited discretion in refusing to grant the government's motion to dismiss.

We note that in the wake of the Supreme Court's opinion in *Rinaldi*[9], the Fifth Circuit judges again considered this issue *en banc* and restored some of the discretion *Cowan* purported to take away from the prosecutor by emphasizing the very limited circumstances which will justify judicial interference. *United States* v. *Hamm*, 659 F.2d 624 (5th Cir. 1981) *(en banc)*, in which the majority of the judges of the 5th Court of Appeals again reversed the trial court, which had refused to grant dismissal. The court expressly followed the Supreme Court's lead in holding "that the 'leave of court' requirement of Rule 48(a) is primarily intended to protect the defendant against prosecutorial harassment." *Id.* at 628. *Hamm* retreats somewhat from *Cowan* by quoting restrictive language from that opinion and adding even more limiting language to it: "We continue to hold that even when the defendant consents to the motion to dismiss, the trial court, **in extremely limited circumstances in extraordinary cases**, may deny the motion when the prosecutor's actions **clearly indicate** a 'betrayal of the public interest.'" *Id.* at 629 (quoting *Cowan*, 524 F.2d at 514) (emphasis added). In short, "[u]nless the court finds that the prosecutor is clearly motivated by considerations other than [her] assessment of the public interest, it must grant the motion to dismiss." *Hamm*, 659 F.2d at 630. The only circumstances specifically mentioned by the majority as constituting improper motivation to dismiss are the prosecutor (1) receiving a bribe, (2) wanting to attend a social event rather than trial,[10] or (3) personally disliking the victim of the crime. *Id.* A plea agreement with the defendant that the prosecutor will dismiss the case if the judge

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[9] In *Rinaldi v. United States*, 434 U.S. 22. 29 n.15 (1977), the Supreme Court reversed an *en banc* decision of the Fifth Circuit Court of Appeals, *sub nom., In re Washington*, 544 F.2d 203 (5th Cir. 1976).

[10] See *United States v. Weber*, 721 F.2d 266 (9th Cir. 1983).

refuses to impose the agreed - upon sentence would also be such a circumstance. *Id.*[11]

Judge Hollar thus was required to grant the *Dawsey* Motion unless she had some affirmative basis to believe that the dismissal was clearly motivated by considerations contrary to the public interest. *Rinaldi,* 434 U.S. at 30.[12] Nothing recited in her Dawsey Order suggests even a hint of such betrayal of the public interest by the Government or the AAG handling this case. Judge Hollar does express her concern about what she felt to be 'overwhelming federal presence'.

> The defendant, according to the record, is an Assistant [sic] U.S. Marshal. This Court would be remiss, given the turn of events, if it did note [sic] the overwhelming "federal presence" that has existed throughout the pendency of this action. At every scheduled hearing, a member of the U.S. Marshal Service has escorted the defendant to court or has been present in court or immediately outside the courtroom. At one point, the U.S. Marshal and the defendant, seated themselves in the undersigned's office, a restricted area, reportedly "waiting" for the Court to act on the dismissal of this action. If this type of "undue influence" has played any part in the Government's decision to dismiss this action, the record should so reflect instead of any **pretextual reasons.**

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[11] While the prosecutor in the *Hamm* case may have mislead defense counsel to believe that the judge had agreed to the sentence when in fact the court had not so agreed, the majority of the court looked to the motivation of the prosecutor at the time of the decision to dismiss and found that the motion was not prompted by such improper motive. *United States v. Hamm,* 659 F.2d 624, 630 (5th Cir. 1981) *(en banc).*

[12] *United States v. Hayden,* 860 F.2d 1483 (9th Cir. 1988); *Hamm,* 659 F.2d at 631; *United States v. Ammidown,* 497 F.2d 615 (D.C. Cir. 1973).

Dawsey Order of July 26 (bold emphasis added).

We do not agree that this concern was well-founded. We do not find it unexpected that the petitioner, himself a United States Deputy Marshal, should be accompanied by one or more of his co-workers at various court appearances. It is also not surprising that the petitioner's supervisor, the United States Marshal, should come with him to the judge's office to obtain a copy of the motion and dismissal order, which it was reasonable for them to expect would have been signed. A criminal charge of any nature, even a misdemeanor, is obvious cause for concern to someone like petitioner who is involved in federal law enforcement. It is, however, somewhat surprising that a Territorial Court judge would be inclined to equate this 'federal presence' with 'undue influence' and to speculate that it may have been the, 'real reason,' as opposed to a 'pretextual reason', the Virgin Islands Department of Justice moved to dismiss the case against petitioner. By no stretch of the imagination can the facts of this case qualify as the kind of extremely limited circumstances in an extraordinary case where the prosecutor's actions indicate a betrayal of the public interest.

Moreover, the nominal respondent has turned the presumption that the prosecutor acts in good faith[13] on its head and has improperly put the burden on the AAG to show that dismissal is in the public interest. "The trial judge cannot merely substitute [her] judgment for that of the prosecutor." *Hamm,* 659 F.2d at 631. Although Rule 48(a) does not require a statement of reasons for the motion to dismiss,[14] the prosecutor here supplied sufficient reason and basis for dismissal in the very body of the

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[13] *United States v. Dyal,* 868 F.2d 424 (11th Cir. 1989); *United States v. Olson,* 846 F.2d 1103 (7th Cir.), *cert. denied,* 488 U.S. 850 (1988); *United States v. Cowan,* 524 F.2d at 514.

[14] As pointed out in *Hamm* and *Cowan,* a preliminary draft of Rule 48 included language that the prosecutor "'may file a dismissal of the indictment or information with a statement of the reasons therefor,'" which was deleted from the final version as promulgated by the Supreme Court. *Cowan,* 524 F.2d at 510-11; *Hamm,* 659 F.2d at 631 n.23.

Dawsey Motion itself, as filed on July 6, 1995, namely, that "the victim . . . now states that the facts as first alleged are not true and no longer wishes to pursue this matter [and that] [w]ithout the testimony of the victim as originally reported, the government would not be able to meet its burden of proof beyond a reasonable doubt." There was thus no basis for the trial court to have required the Government to supply even the additional affidavit the AAG filed on July 11th.[15]

The remainder of the Order of July 26 is an effort by the nominal respondent to second guess the prosecutor's evaluation of the facts of the case and its prosecutorial merit, clearly a task which must be left exclusively to the executive branch. Apparently based on other allegations the nominal respondent became aware of during the course of pretrying the case, the judge observed that the "contention by the Government that victim has recanted his initial version of what happened is 'surprising.'" She added that, "[s]ince significant facts stated by the police officer can be independently corroborated, the Court needs to know what portion of the victim's version has been recanted and is not true." *Dawsey* Order of July 26.

We hold that the trial court simply does not need to know this kind of information about the prosecutorial merit of a case because the court cannot substitute its judgment for that of the prosecutor. As we have already pointed out, the text of the *Dawsey* Motion in and of itself shows that the AAG had evaluated the evidence in the case and had found that it was based on false statements, i.e. that the complaining witness had concocted the original version. It is, after all, very much in the public interest that false and false and fraudulent evidence not

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[15] The argument of nominal respondent that the petition is moot or premature because the AAG has not complied with the *Dawsey* Order of July 26 to supply additional affidavits similarly fails.

be used to prosecute a citizen.[16] The Government, through its AAG, investigated the facts, weighed and balanced the interest of the public, and concluded that it was not in the public interest to pursue the prosecution. Without some credible evidence of the kind of improper prosecutorial motivation which indicates a betrayal of the public interest, e.g. bribery or other corruption, personal dislike for the victim, interference with the sentencing function of the court, "[n] either this court on appeal nor the trial court may properly reassess the prosecutor's evaluation of the public interest." *Hamm,* 659 F.2d at 631.[17]

The Writ of Mandamus — Requirements Met

The first requirement for mandamus is satisfied by the lower court's clear abuse of discretion which usurped the executive's constitutionally separate power to dismiss this prosecution with

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[16] This is especially so in the context of a family dispute such as this where the parties have gotten back together. The same prosecuting authority has determined that this family dispute would be best handled in the Family Division of the Territorial Court. Courts and common experience recognize the high percentage of victims of reported domestic violence who ultimately refuse to prosecute. Especially where the victim wants no part of the litigation and reestablishes the family relationship, pursuing the criminal case would be a waste of time, effort and prosecutorial resources and could be detrimental to the overall interests of the public. See *United States v. Ammidown,* 497 F.2d at 621. (Prosecutor alone is in position to evaluate government's prosecutorial resources and number of cases it is able to handle).

[17] And this is the crux of our difference with the dissent. Whatever the words 'by leave of court' mean, they cannot be construed to authorize the trial judge to second-guess the exercise of prosecutorial discretion in evaluating the validity and strength of the evidence available to prosecute the case. We have fully considered that the nominal respondent may have had access to contrary statements of fact during the pretrial of this case, but the assessment of those factual conflicts are committed under our system to the sound discretion of the prosecutor. While the Supreme Court has never explicitly approved any purpose of 'by leave of court' other than to protect the defendant from harassment by the prosecutor, the Court surely would never agree that these words were intended to give one branch of government the discretion to harass a co-equal branch.

prejudice . The dissent makes the assertion that "[t]rial courts have the power to enter erroneous orders," citing *Will* v. *United States,* 389 U.S. 90, 98 n.6 (1967). If by this reference is meant that trial judges sometimes enter orders which are later held to be erroneous, we have no quarrel with the statement. If, however, the dissent is asserting the proposition that a trial judge has the discretion to deliberately enter an order he knows to be erroneous, we strenuously disagree and submit that neither *Will,* nor any other Supreme Court case, supports such a proposition.[18] It makes no difference here whether the nominal respondent has ruled on the motion. Our holding is that she had no discretion not to grant the respondent's motion to dismiss. By withholding ruling until she had more evidence from the Government, the lower court's "conduct amount[ed] to a judicial usurpation of power such that it act[ed] without its prescribed jurisdiction..." *DeBeers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212, 217 (1945); see *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 26 (1943); *Kerr,* 426 U.S. at 402.

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[18] The first two sentences omitted from the footnote quoted by the dissent (infra n.2) shed more light on the Court's reference:

> Nor do we understand the Government to argue that a judge has no power to enter an erroneous order. Acceptance of this semantic fallacy would undermine the settled limitations upon the power of an appellate court to review interlocutory orders. Neither "jurisdiction" nor "power" can be said to "run the gauntlet of reversible errors." Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. "Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable."

Will v. United States, 389 U.S. 90. 98 n.6 (1967) (citations omitted).

The second requirement -- petitioner's clear right to have this misdemeanor prosecution dismissed -- has also been indisputably established. Skipping to the fourth requirement, the petitioner will be irreparably harmed if the trial court's error is not corrected. He is still subject to a criminal charge despite the decision of the Government not to prosecute. Petitioner is also subject to an administrative proceeding which could put his very livelihood and that of his family in jeopardy. In addition, the conditions of his bail unjustifiably prevent him from traveling out of the Territory without permission. The fourth requirement for mandamus thus has been met.

Regarding the final requirement for the writ to issue, we find that the petitioner has no other adequate means to obtain relief to prevent this irreparable harm from continuing, Two separate arms of the Virgin Islands Government are at an impasse -- the executive will not supply the information required by the judiciary and the court will not grant the *Dawsey* Motion without that information."[19] What does the trial judge expect to do if the prosecutor refuses to put on a case? Hold the AAG in contempt? Call witnesses itself and put on the evidence? We have been able to find no provision in the Virgin Islands Code authorizing the appointment of a special prosecutor in these circumstances. This is the very impasse recognized and anticipated in *Cowan*: "the Attorney General would still have discretion to decline to move the case for trial; in which event, the court would be without power to issue mandamus or other order to compel prosecution since such direction would violate the traditional Separation of Powers Doctrine." *Cowan*, 524 F.2d at 511. The nominal respondent's failure to grant the motion

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[19] As noted earlier, the lower court will not even deal with the issue on the merits. *See supra*, n.l. Moreover, this matter has been tabled by the Territorial Court, as demonstrated by responses to this Court's Order of November 13th requesting an update on the status of the motion to dismiss.

to dismiss is not an appealable order, so there is no danger that the writ is being used as a substitute for appeal.[20]

Finally, we note that the Court of Appeals for the Third Circuit has rejected efforts to "cabin our discretion to order mandamus to situations in which [the lower] court either exceeded its lawful jurisdiction or declined to exercise a non-discretionary power," observing that "'courts have not confined themselves to any narrow or technical definition of the term "jurisdiction"' in using the writ to regulate proceedings in the [trial] court. Accordingly, mandamus may issue to correct clear abuses of discretion, to further 'supervisory and instructional goals', and to resolve 'unsettled and important' issues." *Wexler,* 31 F.3d at 128-29 (citations omitted). The record in this case makes it clear that the important issue of the scope of a Territorial Court judge's discretion to withhold leave of court to dismiss a criminal prosecution is unsettled. Moreover, the issuance of mandamus in this case will further the supervisory and instructional goal of resolving this issue.

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[20] The suggestion by the dissent that petitioner could have moved to have the nominal respondent issue an order for the Government to show cause why it should not comply with her July 26th Order begs the question, for it assumes that she had the discretion to require the respondent to supply the information sought in the July 26th Order. We have found that the issuance of this Order was an abuse of discretion.

CONCLUSION

For all of these reasons, we reluctantly grant the petition for a writ of mandamus and direct Judge Hollar to enter an order dismissing this case with prejudice.[21] A separate order follows.

FOR THE COURT:

/s/ THOMAS K. MOORE
CHIEF JUDGE

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[21] It would be a meaningless gesture for us to remand for the nominal respondent to rule on the motion now that we have established that the motion to dismiss must be granted. There simply is no discretion for the court to exercise and petitioner is entitled to relief from this criminal prosecution forthwith. This case thus presents one of those "special circumstances...dictated by considerations of sound judicial administration, in order to obviate further and entirely unnecessary proceedings below" in which an appellate court should take upon itself to finally dispose of the entire case. *Grosso v. United States*, 390 U.S. 62, 71-72 (1968); *see Yates v. United States*, 354 U.S. 298, 331 (1957) (acquittal ordered by Supreme Court because "evidence entirely too meagre to justify putting [defendants] to a new trial..."), overruled on other grounds by *Burks v. United States*, 437 U.S. 1 (1978).

ANDREWS, Territorial Court Judge, dissenting.

The main issue before us is the extent to which the phrase, "by leave of court", in Rule 48(a) limits the prosecutor's previously enjoyed absolute power to dismiss an information or complaint. *United States* v. *Cowan,* 24 F.2d 504, 506 (5th Cir. 1975), *cert. denied,* 425 U.S. 971 (1976) . The Supreme Court has stated that the phrase vests some discretion in trial courts when ruling on motions to dismiss, but has yet to delineate the circumstances under which it may be properly exercised. *Rinaldi* v. *United States,* 434 U.S. 22, 29 n.15 (1977). The Court nevertheless has acknowledged the existence, within the circuits, of the discretion to deny the motion even where the defendant consents. *Id.* (stating that the Rule has been held to permit denial of a motion to dismiss, consented to by the defendant, "if the motion is prompted by considerations clearly contrary to the public interest".) In determining the extent of the court's discretion, the majority relies almost exclusively on decisions of the Fifth Circuit. Other circuits have issued slightly varying decisions and there is no controlling decision on the issue in this jurisdiction or in the Third Circuit. I write separately in light of my disagreement with the majority's interpretation of the law governing Rule 48(a) and their application of the law governing the issuance of mandamus.

In my view, the absence of controlling precedent alone strongly suggests that the petitioner's right to relief is not "clear and indisputable". *Mallard* v. *United States District Court,* 490 U.S. 296, 309 (1989); *Will* v. *Calvert Fire Insurance Company* 437 U.S. 655, 666 (1978) . Further, it is well established within the circuits, that a trial court has the discretion and duty to deny a motion to dismiss where it is motivated by bad faith or where dismissal is contrary to the public interest. *See United States* v. *Smith,* 55 F.3d 157, 159 (4th Cir. 1995) (stating that although trial court's discretion when considering motion to dismiss is limited, it may deny it where bad faith or disservice to the public interest is found); *United States* v. *Hayden,* 860 F.2d 1483, 1487

(9th Cir. 1988) (stating that "Rule 48(a) empowers the district court to exercise its discretion in denying the motion when it specifically determines that the government is operating in bad faith."); *United States* v. *Welborn,* 849 F.2d 980, 983 n. 2 (5th Cir. 1988) (citing *United States v. Hamm,* 659 F.2d 624, 629 (5th Cir. 1981) (stating that "even when the defendant consents to the motion to dismiss, the trial court, in extremely limited circumstances in extraordinary cases, may deny the motion when the prosecutor's actions clearly indicate a 'betrayal of the public interest.'"); *United States* v. *Strayer,* 846 F.2d 1262, 1265 (10th Cir. 1988) (stating that "the rule is also intended to allow courts to consider public interest, fair administration of" criminal justice and preservation of judicial integrity when evaluating motions to dismiss). Clearly then, courts are not a mere "rubber stamp" to a prosecutor's motion to dismiss. *United States* v. *Ammidown,* 497 F.2d 615, 622 (D.C. Cir. 1973). In light of the circuits' affirmation of the court's discretionary power, I would find that the nominal respondent possessed the jurisdiction and power to deny the government's motion to dismiss if she found that it was motivated by bad faith or was contrary to the public interest.

In determining whether motions to dismiss are motivated by bad faith or is contrary to the public interest, the Tenth Circuit has held that the court "must be informed of the prosecutor's reasons for dismissing the indictment and the factual basis for the prosecutor's decision." *Strayer,* 846 F.2d at 1266. Vague or conclusory reasons will not suffice. *Id.* at 1266. As the District of Columbia Circuit stated:

> ...the court will not be content with a mere conclusory statement by the prosecutor that dismissal is in the public interest, but will require a statement of reasons and underlying factual basis... The rule contemplates exposure of the reasons for dismissal in order to prevent abuse of the uncontrolled power of dismissal

> previously enjoyed by prosecutors, and in pursuance of this purpose 'to gain the Court's favorable discretion, **it should be satisfied that the reasons advanced for dismissal are substantial.'**

Ammidown, 497 at 620 (emphasis supplied). Similarly, the Fifth Circuit has expressed its agreement that "the prosecutor usually should supply more than 'a mere conclusory interest.'" *Hamm,* 659 F.2d at 631 n.23. Additionally, at least one federal court has held that

> "Ultimately, it is for the court in either granting or denying leave to file the dismissal, to agree or disagree with the conclusion of the Attorney General or the United States Attorney that the dismissal is 'in the interest of justice.'"

United States v. Abreu, 747 F. Supp. 493, 503 (N.D. Ind. 1990) (citations omitted).

In the case subjudice, the government submitted a factual basis in support of its motion to dismiss. In sum, it asserted that the minor victim had recanted his original statements, that a defense witness verified the "new version", and that consequently the government could not meet its burden. The nominal respondent, having been privy to "contrary factual information", ordered the production of additional factual information. This contrary factual information, I find, was given insufficient attention by the majority. Specifically, the nominal respondent was previously presented with the following information:

> 1) The petitioner's wife told the police upon arrival at the crime scene, that he had assaulted the minor victim, that the situation with the petitioner is ongoing whenever the petitioner is intoxicated, that the petitioner had assaulted her in the past, had threatened to harm her, and to kill the minor and her if she ever reported him to the police;

> 2) Immediately after the incident, the minor victim was bleeding from his face, sustained several abrasions to his cheek, neck, and chin, and was treated at the hospital;
>
> 3) The minor victim stated that he had a verbal altercation with the petitioner who subsequently punched him in the face; and
>
> 4) As a consequence of the alleged threat by the petitioner, the minor victim and the petitioner's wife were housed by victim advocates at a location unknown to the petitioner.

Government's Motion to Dismiss dated 8/2/95, Exhibit No. 4 (Probable Cause Fact Sheet); Nominal Respondent's Order dated 7/26/95, Page 2. In an attempt to carry out her duty to assure that the motion was "not 'contrary to the public interest' and that the motion is made in 'good faith'", the nominal respondent ordered the production of additional supporting material. Nominal Respondent's Order dated July 26, 1995 (Exhibit 3 of Government's Motion to Dismiss). It was reasonable under these circumstances, pursuant to the court's discretionary power in ruling on motions to dismiss, to require additional information. The nominal respondent clearly was concerned that the victim's new version may have been influenced by the petitioner, in light of the allegation that he had threatened the victim's life in the event he went to the police.[1] What this Court would have done is of no moment, for it is not our function to "actually control the decision of the

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[1] Further the affidavit submitted by the government failed to explain what the "new version" was. That information although not generally presented with motions to dismiss became significant and necessary in this case, since the court was privy to substantial evidence of the petitioner's guilt.

trial court." *Platt v. Manufacturing Company,* 376 U.S. 240, 245 (1964) (quoting *Banker's Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383 (1953)). The initial question is whether, under these circumstances, the nominal respondent's Order can be labeled, a "clear error of law or an abuse of discretion." I think not.

Even if the nominal respondent committed clear error or abused her discretion, this still would not be enough to warrant mandamus. Trial courts have the power to enter erroneous orders.[2] *Will* v. *United States,* 389 U.S. 90, 98 n.6 (1967). Only where the court's conduct amounts to a judicial usurpation of power such that it acts without its prescribed jurisdiction is mandamus warranted. See *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 27 (1943) (refusing to issue mandamus and stating that "district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power); *Communication Workers* v. *American Telephone and Telegraph Company,* 932 F.2d 199, 210 (3d Cir. 1991) (refusing to issue mandamus upon finding that any error by district court did not to rise to usurpation of judicial power). Here, the nominal respondent has not even ruled on the motion to dismiss. Her

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[2] As the Supreme Court warned,

> Neither "jurisdiction" nor "power" can be said to "run the gauntlet of reversible errors." [citations omitted] Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power"into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. "Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable."

Will v. United States, 389 U.S. 90, 98 n.6 (1967) (citing *De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 226 (1945) *Will v. Calvert Fire Insurance Company,* 437 U.S. 655, 666 n.7 (1978).

request for further information was within her prescribed jurisdiction, and did not amount to a usurpation of judicial power.

The writ should be denied here also because other adequate alternative means of relief exist. *Mallard*, 490 U.S. at 309; *United States v. Wexler,* 31 F.3d 117, 128 (3d Cir. 1994), *cert. denied,* 115 S. Ct. 1251 (1995). The petitioner need not engage in piecemeal appellate litigation. He could move the trial court to issue an order to show cause against the government for failure to comply with the nominal respondent's July 26th Order. That failure to comply, incidently, is the real cause for the delay in this matter. Alternatively, the petitioner could himself urge or even assist the government in producing the required information. Upon receipt of the requested information, the Court may decide to grant the motion, thus putting this entire matter to rest. Should the motion be denied, which it has not been, the petitioner may request certification for an interlocutory appeal pursuant to FED. R. APP. P. 5. If granted, he would then obtain review without need to petition us for an extraordinary writ. In the event that permission to appeal is denied, the government may reconsider and decide to prosecute after having evaluated the court's reasons for denial. If the government refuses to prosecute, the petitioner would then have a stronger basis to allege the absence of alternative relief. We do not know what will happen and it is not for us to predict the course of events. What we do know is that several possibilities exist. These should first be explored before invoking this Court's power to issue extraordinary relief. See *Rapp* v. *Van Dusen,* 350 F.2d 806, 813 (3d Cir. 1965) [stating that "petitions for the writ should allege that an unsuccessful request was made for certification under §1292(b) [i.e., FED. R. APP. P. 5] , or why such an application was inappropriate in the circumstances".) The petition is thus premature.

We must remain ever cognizant of the fact that the remedy of mandamus against a judge is a drastic and extraordinary one.

It's use is discouraged because it has the unfortunate consequence of making the judge a litigant and results in piecemeal appellate litigation. *Mallard,* 490 U.S. at 309; Ex Parte Fahey, 332 U.S. 258, 259 (1947). As such the remedy is "reserved for really extraordinary causes". Ex Parte Fahey, 332 U.S. at 259 (emphasis supplied). In this case: 1) there is no controlling decision on the key issue in this jurisdiction; 2) courts have the jurisdiction and power to deny motions to dismiss where it is not made in good faith or is contrary to public interest; 3) there exists sufficient cause for concern that the motion may be contrary to the public interest; 4) The nominal respondent has yet to rule on the motion; and 5) adequate means of alternative adequate relief exists. For these reasons, I conclude that the petitioner has not met his burden of establishing that his right to relief is clear and indisputable, and would deny the writ. Accordingly, I respectfully dissent.

Dated this 13th day of June, 1996.

ATTEST:

ORINN F. ARNOLD
Clerk of the Court

Frank Blackman
/s/ BY: Deputy Clerk

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

D. Ct. Civ. No. 129-95
Re: Terr. Ct. Crim. No. 232-1995

KIM D. DAWSEY,
Petitioner,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS,
Respondent,

HONORABLE TERRITORIAL COURT JUDGE
BRENDA J. HOLLAR,
Nominal Respondent.

On Petition from the Territorial Court of the Virgin Islands

Considered: September 22, 1995
Filed: June 13, 1996

BEFORE: **THOMAS K. MOORE,** Chief judge, District Court of the Virgin Islands; **RAYMOND L. FINCH**, District Court Judge for the District of the Virgin Islands; and **ALPHONSO G. ANDREWS,** Judge of the Territorial Court of the Virgin Islands, Division of St. Croix, Sitting by Designation.

APPEARANCES :
Charles Herndon, Esq.
St. Thomas, U.S.V.I.
Attorney for Petitioner

Richard Davis, Esq., Assistant Attorney General
V.I. Department of Justice St. Thomas, U.S.V.I.
Attorney for Respondent

Leon Kendall, Esq., General Counsel
Territorial Court of the Virgin Islands
St. Thomas, U.S.V.I.
Attorney for Nominal Respondent

ORDER OF THE COURT

AND NOW, this 13th day of June, 1996, having considered the submissions of the parties; and for the reasons set forth in the Court's accompanying Memorandum of even date;

IT IS ORDERED AND ADJUDGED that Kim Dawsey's petition for writ of mandamus is **GRANTED** and the matter is **REMANDED** to the Territorial Court with directions to enter an order dismissing this prosecution with prejudice.

/s/ THOMAS K. MOORE
CHIEF JUDGE

A T T E S T:

ORINN F. ARNOLD
Clerk of the Court

/s/ BY: Frank Blackman
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96 -7434

KIM D. DAWSEY,
Appellee

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellee

HONORABLE JUDGE BRENDA J. HOLLAR,
Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, CHIEF JUDGE,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS,
and MCKEE
Circuit Judges

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of

the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Sloviter, Becker, Stapleton, Greenberg, and Cowen would have granted rehearing.

BY THE COURT

Circuit Judge
/s/ Hon. Theodore A. McKee

Date: February 20, 1997

APPENDIX D

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

CRIMINAL NO. 232/1995

GOVERNMENT OF THE VIRGIN ISLANDS,

Plaintiff,

vs.

KIM DAVID DAWSEY,

Defendant.

ORDER

This matter is before the Court on a motion to dismiss this action with prejudice, filed on July 6, 1995, and supplemented on July 11, 1995.

Before ruling on the matter, the Court must be assured that the dismissal is not "contrary to the public interest" and that the motion is made in "good faith". See *United States v. Cowan,* 524 F.2d 504 (C.A. 5th 1975).

The defendant, according to the record, is an Assistant U.S. Marshal. This Court would be remiss, given the turn of events, if it did note the overwhelming "federal presence" that has existed throughout the pendency of this action. At every scheduled hearing, a member of the U.S. Marshal Service has escorted the defendant to court or has been present in court or immediately outside the courtroom. At one point, the U.S. Marshal and the defendant, seated themselves in the undersigned's office, a restricted area, reportedly "waiting" for the Court to act on the dismissal of this action. If this type of "undue influence" has played any part in the Government's decision to dismiss this action, the record should so reflect instead of any pretextual reasons.

The contention by the Government that victim has recanted his initial version of what happened is "surprising" since Officer Raymond, in support of probable cause for the arrest said that he and Officer L. Raymo were dispatched to a family disturbance located in Upper Contant on May 6, 1995. Upon arrival at the scene, the defendant's wife stated that her husband physically assaulted her son in the bathroom of their home. The wife also informed the officers the incident that occurred was an ongoing situation whenever the defendant becomes intoxicated. It was also stated that the defendant threatened to do bodily harm to his wife and threatened to kill her, the son and himself if the wife ever reported him to the police.

As a result of the alleged physical assault committed by defendant, the son was bleeding from his face, taken to St. Thomas Hospital, and treated for several abrasions to his cheek, neck and chin. Following the incident, the officers reported that the son and wife of defendant were put up by the victim advocates, in a safe place, unknown to the defendant.

Since significant facts stated by the police officer can be independently corroborated, the Court needs to know what portion of the victim's version has been recanted and is not true.

In light of the foregoing, it is

ORDERED, that the Govern-ment have the victim and his mother submit separate affidavits, setting forth what portion of the original version of the facts is false; the reason they wish to discontinue the present action; whether they have been threatened or coerced in any manner regarding the prosecution of this matter; and whether their present position, not to pursue this matter, has been influenced in any way by the defendant; and it is further

ORDERED, that the Government submit the statement by the "witness" to the event, as referred in the supplemented motion, verifying the true version of the incident, and to provide Dr.

Tom Tyne's substantiation of the new version and why he believes the complaining witnesses concocted the original version; and it is further

ORDERED, that Government disclose the action filed in Family Court which addresses the issues involved; and it is further

ORDERED, that this ORDER be directed to counsel for the respective parties.

Dated: July 26, 1995

/s/ BRENDA J. HOLLAR
Judge of the Territorial Court
of the Virgin Islands

ATTEST:
/s/ YVONNE V. WESSELHOFT
Clerk of the Court

APPENDIX E

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Criminal No. 232/95

GOVERNMENT OF THE VIRGIN ISLANDS,

Plaintiff,

vs.

KIM DAVID DAWSEY,

Defendant.

MOTION TO DISMISS

COMES NOW, the Government of the Virgin Islands, by and through its undersigned counsel, and hereby moves this Honorable Court to dismiss the above captioned matter with prejudice. The victim in this matter now states that the facts as first alleged are not true and nor longer wishes to pursue this matter. Without the testimony of the victim as originally reported, the government would not be able to meet its burden of proof beyond a reasonable doubt.

WHEREFORE, in the interest of justice, the Government prays that this Motion to Dismiss, with prejudice, be GRANTED.

RESPECTFULLY SUBMITTED;

ALVA A. SWAN
Acting Attorney General

Dated: July 6, 1995

BY:
/s/ DEBORAH KLEINMAN ROBINSON, ESQ.
Assistant Attorney General
Department of Justice
GERS Building, 2nd Floor
St. Thomas, V.I. 00802

APPENDIX F

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

D. Ct. Civ. No. 129-95
Re: Terr. Ct. Crim. No. 232-1995

KIM D. DAWSEY,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Respondent,

HONORABLE TERRITORIAL COURT JUDGE
BRENDA J. HOLLAR,
Nominal Respondent.

On Petition from the Territorial Court of the Virgin Islands

BEFORE: **THOMAS K. MOORE,** Chief judge, District Court of the Virgin Islands; **RAYMOND L. FINCH**, District Court Judge for the District of the Virgin Islands; and **ALPHONSO G. ANDREWS,** Judge of the Territorial Court of the Virgin Islands, Division of St. Croix, Sitting by Designation.

APPEARANCES :
Charles Herndon, Esq.
St. Thomas, U.S.V.I.
Attorney for Petitioner

Richard Davis, Esq., Assistant Attorney General
V.I. Department of Justice St. Thomas, U.S.V.I.
Attorney for Respondent

Leon Kendall, Esq., General Counsel
Territorial Court of the Virgin Islands
St. Thomas, U.S.V.I.
Attorney for Nominal Respondent

ORDER OF THE COURT

This matter is before the Court upon nominal respondent's motion for stay of this Court's Order dated June 13, 1994 pending appeal pursuant to FED. R. APP. P. 8(a). This Court's June 13th Order granted Dawsey's petition for writ of mandamus and directed the Territorial Court to dismiss Terr. Ct. Crim. No. 232-1995. Petitioner has filed his opposition to the motion.

In support of the motion, nominal respondent has indicated that on appeal, she challenges this Court's jurisdiction to consider the petition and its interpretation of the discretion vested in the Territorial Court judge to refuse to dismiss a criminal action after the prosecutor has filed a motion to dismiss. Petitioner contends that only he will continue to experience substantial harm if a stay is granted, and that a stay is not in the public's interest. Urging this Court to reject nominal respondent's request, petitioner further states that the issues on appeal will not be rendered moot if the stay is denied and the criminal action in the Territorial Court is dismissed pursuant to this Court's June 13 Order.

The issuance of a stay is grounded in the sound discretion of this Court. Upon review of the record, we agree that expedient resolution of the outlined issues on appeal is crucial. Moreover, because there is no need for transcript preparation, the appeal may proceed without delay. Petitioner nonetheless presents a valid concern that he will continue to suffer substantial prejudice

until the appeal is decided. The Court being advised in the premises, and in the interests of justice,

IT IS ORDERED, that nominal respondent's motion for stay pending appeal is **GRANTED**, conditioned upon her request, to be filed forthwith, to the United States Court of Appeals for the Third Circuit for expedited review of her appeal; and

THAT nominal respondent shall file forthwith a cost bond in the amount of $500.

Dated this 1st day of July, 1996.

FOR THE COURT:
/s/ THOMAS K. MOORE

CHIEF JUDGE

ATTEST:
ORINN F. ARNOLD
Clerk of the Court

/s/ BY: Deputy Clerk

APPENDIX G

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, Section 3, Clause 2 of the Constitution of the United States provides, in part, that "Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States ..."

Section 23 of the Revised Organic Act of 1954, as amended 48 U.S.C. Section 1613, provides in pertinent part:

RELATIONS BETWEEN COURTS

> "The relations between the courts established by the Constitution or laws of the United States and the courts established by local law with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings..."

Section 23A of the Revised Organic Act as amended, 48 U.S.C. Section 1613a, provides in pertinent part:

APPELLATE REVIEW BY DISTRICT COURT OF THE VIRGIN ISLANDS

> "(a) Prior to the establishment of the appellate court authorized by Section 21(a) of this Act, the District Court of the Virgin Islands shall have such appellate jurisdiction over the courts of the Virgin Islands established by local law to the extent now or hereafter prescribed by local law ..."

Section 33 of the Title 4 of the Virgin Islands Code, provides in pertinent part:

APPELLATE JURISDICTION

"The district court has appellate jurisdiction to review the judgments and orders of the Territorial Court in all civil cases, in all juvenile and domestic relations cases, and in all criminal cases in which the defendant has been convicted, other than on a plea of guilty... Upon appeal the District Court may affirm, modify, vacate, set aside or reverse any judgment or order appealed from and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances..."

Section 34 of the Title 4 of the Virgin Islands Code, provides in pertinent part:

RULES AND WRITS

"The district court may from time to time prescribe rules, consistent with law and with the rules adopted by the Supreme Court, for the conduct of its business and may issue writ of habeas corpus, review and prohibition and all other writs and make mandatory orders and all other orders necessary or appropriate in aid of its original or appellate jurisdiction and agreeable to the usages and principles of law.

Section 72b of the Title 4 of the Virgin Islands Code, provides in pertinent part:

> **GENERAL POWERS AND DUTIES OF PRESIDING JUDGE; DESIGNATION OF JUDGES AND DIVISION OF BUSINESS**
>
> "(a) The presiding judge of the Territorial Court shall be the administrative head of the Court...He shall be responsible for the observance by the Court of the rules...governing the practice and procedures of the Territorial Court and prescribing the duties of its judges and officers and the times and places of holding court. In conformity with such rules, he shall...divide the business and assign the cases among all the judges of the court in such manner as will secure the prompt dispatch of the business of the court...He shall supervise and direct the officers and employees of the court in the performance of their duties..."

Rule 7 of the Rules of the Territorial Court, provides in pertinent part:

> "The practice and procedure in the Territorial Court shall be governed by the Rules of the Territorial Court and, to the extent not inconsistent therewith, by the Rules of the District Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence..."